

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA

Tommy Burgess, # 249773,	)	<b>C/A No. 4:08-2477-HFF-TER</b>
	)	
	)	
Petitioner,	)	
	)	
vs.	)	<b>Report and Recommendation</b>
	)	
McKither Bodison, Warden,	)	
	)	
	)	
Respondent.	)	

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*Background of this Case*

This is a habeas corpus action filed by a state prisoner pursuant to 28 U.S.C. § 2254. The petitioner is an inmate at the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC). On May 26, 2005, in the Court of General Sessions for Williamsburg County, the petitioner was convicted, in a jury trial, of distribution of marijuana in proximity of a school and distribution of marijuana. He was sentenced to consecutive terms of five and fifteen years. The petitioner indicates that no direct appeal was filed.

The petitioner states that he has a post-conviction case that has been pending for over two and one half years. The petitioner raises only one (1) ground in the Section 2254 petition: inordinate delay in the pending post-conviction case.

### ***Discussion***

Under established local procedure in this judicial district, a careful review has been made of the *pro se* petition pursuant to the procedural provisions of 28 U.S.C. § 1915 and the Anti-Terrorism and Effective Death Penalty Act of 1996. The review<sup>1</sup> has been conducted in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Maryland House of Correction*, 64 F.3d 951 (4th Cir. 1995)(*en banc*); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Boyce v. Alizaduh*, 595 F.2d 948 (4th Cir. 1979) (recognizing the district court's authority to conduct an initial screening of any *pro se* filing);<sup>2</sup> *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978); and *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). The petitioner is a *pro se* litigant, and thus his pleadings are accorded liberal construction. See *Erickson v. Pardus*, 75 U.S.L.W. 3643, 167 L.Ed.2d 1081, 127 S.Ct. 2197 (2007)(*per curiam*); *Hughes v. Rowe*, 449 U.S. 5, 9-10 & n. 7 (1980)(*per curiam*); and *Cruz v. Beto*, 405 U.S. 319 (1972). When a federal court is evaluating a *pro se* complaint or petition, the plaintiff's or petitioner's allegations are assumed to be true. *Fine v. City of New York*, 529 F.2d 70, 74 (2nd Cir. 1975). Even under this less stringent standard, the petition is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear

<sup>1</sup>Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02 (DSC), the undersigned is authorized to review such complaints for relief and submit findings and recommendations to the District Court.

<sup>2</sup>*Boyce* has been held by some authorities to have been abrogated in part, on other grounds, by *Neitzke v. Williams*, 490 U.S. 319 (1989) (insofar as *Neitzke* establishes that a complaint that fails to state a claim, under Federal Rule of Civil Procedure 12(b)(6), does not by definition merit *sua sponte* dismissal under 28 U.S.C. § 1915(e)(2)(B)(i) [formerly 28 U.S.C. § 1915(d)], as "frivolous").

failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir. 1990).

With respect to his convictions for distribution of marijuana and distribution of marijuana in the proximity of a school, the petitioner's sole federal remedy is a writ of habeas corpus under 28 U.S.C. § 2241 or 28 U.S.C. § 2254, which can be sought only after he has exhausted his state court remedies. *See* 28 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270 (1971); and *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-91 (1973) (exhaustion required under 28 U.S.C. § 2241).

State remedies are obvious not exhausted because the post-conviction case is pending. The United States Court of Appeals for the Fourth Circuit has held that South Carolina's Uniform Post-Conviction Procedure Act is a viable state-court remedy. *See Miller v. Harvey*, 566 F.2d 879, 880-81 (4th Cir. 1977); and *Patterson v. Leeke*, 556 F.2d 1168, 1170-73 (4th Cir. 1977).

Inordinate delay in the state court proceedings may justify waiver of exhaustion. *Ingram v. State of South Carolina*, 164 F.3d 624 [Table], 1998 U.S.App. LEXIS® 26544, 1998 WL 726757 (4th Cir., Oct. 18, 1998). *See also Patterson v. Leeke*, 556 F.2d 1168 (4th Cir. 1977); and *cf. United States v. Johnson*, 732 F.2d 379, 381 (4th Cir. 1984).

Even so, the one ground raised in the petition is not a basis for federal habeas corpus relief. Deficiencies in a post-conviction proceeding are **not** cognizable under 28 U.S.C. § 2254. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988) (collecting cases holding that errors in a state post-conviction proceeding "cannot serve as a basis for federal habeas corpus relief"); and 28 U.S.C. § 2254(i), which codifies prior case law on ineffectiveness of post-conviction counsel. As a result, the petitioner's single ground of inordinate delay in a pending post-conviction case will not get the petitioner "out of prison." *See Long v.*

*Ozmint*, \_\_\_ F. Supp. 2d \_\_\_, 2008 U.S. Dist. LEXIS® 26797, 2008 WL 877117 (D.S.C., March 31, 2008)(Floyd, J.), which is closely on point. In fact, summary dismissal of the above-captioned case will prevent the successive petition bar, which adversely affected the state prisoner in *Long v. Ozmint*.

### ***Recommendation***

Accordingly, it is recommended that the § 2254 petition be dismissed *without prejudice and without requiring the respondent to file a return*. See *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (federal district courts have duty to screen habeas corpus petitions and eliminate burden placed on respondents caused by ordering an unnecessary answer or return); *Toney v. Gammon*, 79 F.3d 693, 697 (8th Cir. 1996) (“However, a petition may be summarily dismissed if the record clearly indicates that the petitioner's claims are either barred from review or without merit.”); *Baker v. Marshall*, 1995 U.S. Dist. LEXIS 4614, \*2-\*3, 1995 WL 150451 (N.D. Cal., March 31, 1995) (“The District Court may enter an order for the summary dismissal of a habeas petition if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in this Court.”); and the Anti-Terrorism and Effective Death Penalty Act of 1996. The petitioner's attention is directed to the important notice on the next page.

August 22, 2008  
Florence, South Carolina

s/Thomas E. Rogers, III  
Thomas E. Rogers, III  
United States Magistrate Judge

**Notice of Right to File Objections to Report and Recommendation**

The petitioner is advised that he may file specific written objections to this Report and Recommendation with the District Court Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** In the absence of a timely filed objection, a district court judge need not conduct a *de novo* review, but instead must “only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310 (4th Cir. 2005).

Specific written objections must be filed within ten (10) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three (3) days for filing by mail. Fed. R. Civ. P. 6(a) & (e). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections to:

**Larry W. Propes, Clerk  
United States District Court  
Post Office Box 2317  
Florence, South Carolina 29503**

**Failure to timely file specific written objections to this Report and Recommendation will result in the waiver of the right to appeal from a judgment of the District Court based upon such Recommendation.** 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984); and *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985).